

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

BFI Waste Services and Teamsters Local 728. Case 10-CA-35326

February 28, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on November 19, 2004, the General Counsel issued the complaint on December 17, 2004, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 10-RC-15442.¹ (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting an affirmative defense.

On January 11, 2005, the General Counsel filed a Motion for Summary Judgment. On January 18, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contends that the Union's certification is invalid because the Board erred in overruling its objections to the election. The Respondent also raises as an affirmative defense that "The Union was improperly certified because it engaged in objectionable conduct which rendered a free and fair election impossible."

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this un-

¹ The Board's Decision and Certification of Representative is reported at 343 NLRB No. 35 (2004).

fair labor practice proceeding.² See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation with an office and place of business in Gainesville, Georgia, and Lawrenceville, Georgia, has been engaged in the business of refuse collection, removal, and disposal.

During the 12-month period preceding issuance of the complaint, a representative period, the Respondent has provided services valued in excess of \$50,000 to customers located in the State of Georgia, which customers, in turn, annually ship goods and services valued in excess of \$50,000 to points located outside the State of Georgia and/or who annually receive, from outside the State of Georgia, goods valued in excess of \$50,000.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Teamsters Local 728 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held on April 2, 2004, the Union was certified on September 30, 2004, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time drivers, including roll-off drivers, front-end drivers, residential drivers, recycle drivers, container delivery drivers, swing drivers, lead drivers, helpers, mechanics, tire men and yard men, employed by the Employer at its facilities located at 75 Curtis Road, Lawrenceville, Georgia and 1581 Fullenwider Road, Gainesville, Georgia, excluding all other employees, including driver-trainers, dispatchers, CSR's (Customer Service Representatives), office clerical employees, guards and supervisors as defined by the Act.

² Member Schaumber did not participate in the underlying representation proceeding. He agrees, however, that the Respondent has not raised any new matters or special circumstances warranting a hearing in this proceeding or reconsideration of the decision in the representation proceeding, and that summary judgment is therefore appropriate.

³ The Respondent's request that the complaint be dismissed is therefore denied.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On or about November 3, 2004, the Union requested the Respondent to bargain with it and, since that same date, the Respondent has refused to do so. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing since November 3, 2004, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, BFI Waste Services, Gainesville and Lawrenceville, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Teamsters Local 728 as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time drivers, including roll-off drivers, front-end drivers, residential drivers, recycle drivers, container delivery drivers, swing drivers, lead drivers, helpers, mechanics, tire men and yard men, employed by the Employer at its facilities located at 75 Curtis Road, Lawrenceville, Georgia and 1581 Fullenwider Road, Gainesville, Georgia, excluding all other employees, including driver-trainers, dispatchers, CSR's (Customer Service Representatives), office clerical employees, guards and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facilities in Gainesville and Lawrenceville, Georgia, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed either or both of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 3, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 28, 2005

| | |
|---------------------|----------|
| Robert J. Battista, | Chairman |
| Wilma B. Liebman, | Member |
| Peter C. Schaumber, | Member |

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Teamsters Local 728 as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time drivers, including roll-off drivers, front-end drivers, residential drivers, recycle drivers, container delivery drivers, swing drivers, lead drivers, helpers, mechanics, tire men and yard men, employed by us at our facilities located at 75 Curtis Road, Lawrenceville, Georgia and 1581 Fullenwider Road, Gainesville, Georgia, excluding all other employees, including driver-trainers, dispatchers, CSR's (Customer Service Representatives), office clerical employees, guards and supervisors as defined by the Act.

BFI WASTE SERVICES